No. 24

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE AND HARLAN L. MCFARLAND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

CITATIONS

Cases:

561166—60—1

Cases—Continued

Statutes:

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OPINIONS BELOW

The opinion before trial of the District Court for the Southern District of California (R. 43–55) is reported at 148 F. Supp. 715. That court's oral opinion after trial (R. 437–447), and its findings of fact, conclusions of law, and judgment (R. 105–120) are not reported. The opinion of the court of appeals is reported at 270 F. 2d 290.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1959 (R. 453). A timely petition for rehearing was denied on September 23, 1959 (R. 459).

The petition for a writ of certiorari was filed on December 21, 1959, and granted on February 23, 1960 (R. 459; 361 U.S. 958). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the provisions of the Surplus Property Act, which explicitly confer on the United States the right to elect among three measures of damages in recovering for fraud committed in obtaining Government property, permit the trial court, rather than the Government, to make the election.

2. Whether as a result of arrangements made to collect the lesser judgment entered in favor of the United States by the district court, and not challenged here by respondents, this case has become moot.

STATUTE INVOLVED

Section 26 of the Surplus Property Act of 1944, 58 Stat. 765, 780, 50 U.S.C. App. (1946 ed.) 1635 (repealed, and reenacted by Section 209 of the Federal Property and Administrative Services Act of 1949,[1] 63 Stat. 377, 392, 40 U.S.C. 489), provides in pertinent part as follows:

> (b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property or other benefits from the United States or any

[1] The 1949 reenactment made no change material here. In addition, all of the sales in question here took place before the 1949 reenactment.

Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

(c) The several district courts of the United States, the District Court of the United States for the District of Columbia, and the several district courts of the Territories of the United States, within whose jurisdictional limits the person, or persons, doing or committing such act, or any one of them, resides or shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

STATEMENT

This suit was filed by the United States to recover civil damages from the respondents who had fraudulently obtained certain Government surplus property in violation of Section 26 of the Surplus Property Act, 58 Stat. 765, 50 U.S.C. App. (1946 ed.) 1635. The complaint alleged that respondent Hougham, doing business as Baker's Motor Market, conspired with respondents Dailey, Schwartze, and McFarland, who were veterans, to violate the Act. The substance of the charge was that Hougham used the named veterans as front men to purchase for him, with the use of veterans' priority certificates, surplus property to which Hougham was not otherwise entitled. The complaint sought under Section 26(b)(1) of the Act, $2,000 for each violation of the Act, plus double the amount of actual damages sustained by the Government. Thus, on the basis of the respondents' fraudulent purchases in 168 surplus property transactions, the complaint claimed $336,000 plus double damages (R. 3–23).

The United States thereafter moved for leave to file a first amended complaint which instead sought under Section 26(b)(2) of the Act, twice the consideration agreed to be given to the United States for the fraudulently obtained property. Since the respondents had agreed to pay and had paid $79,512.66, the complaint sought $159,025.32, or a sum substan-

tially less than demanded in the original complaint (R. 25–43). The district court, however, denied the Government's motion, holding that it had made an irrevocable election of remedies by filing its initial complaint (R. 116). In paragraph VII of its Pretrial Conference Order, the district court stated that the following issue of law remained to be litigated upon the trial (R. 101.):

> B. It is the contention of plaintiff that it is entitled to double the amount of the sales price of the vehicles described in the Second Amended Complaint, namely twice the sum of $13,671.02 for Count One, twice the sum of $38,131.13 for Count Two, and twice the sum of $27,710.51 for Count Three. Previously the Court has indicated that an irrevocable election has been made by the United States by virtue of the successive complaints on file. It is the contention of plaintiff that it is entitled to make its election at any time prior to judgment. Plaintiff elects, in the event of judgment in its favor, to receive as liquidated damages a sum equal to twice the consideration agreed to be given to the United States or federal agency involved. Plaintiff respectfully calls this to the attention of the Court so that the point may be preserved for purposes of appeal.

The trial proceeded after the Government had filed a second amended complaint which sought, under Section 26(b)(1) of the Act, $2,000 for each violation (R. 55–73).

During the trial, the United States placed in evidence, as separate exhibits, detailed sales folders

containing sales documents bearing respondents' signatures (R. 149, 211, 215, 216–217, 230, 272, 279, 282) and describing the sales of property which took place. In this fashion, every specific sale alleged in the second amended complaint was proved to have been made as alleged.[5]

In its findings of fact, the district court found that the Government's property had been obtained fraudulently by purchases of trucks and trailers by the respondents on the various dates described in the three counts of the second amended complaint (R. 106–107, 110–111, 112–113). But, while ruling that the property had been obtained fraudulently, the district court rejected the Government's contention that the purchase of each vehicle constituted a separate violation of the Act calling for separate imposition of a $2,000 forfeiture. Instead, the court held that "* * * the genesis of the whole matter are these applications * * *," and assessed one $2,000 forfeiture for each of the four fraudulent applications for a

[5] The following schedule lists the record references for proof of Hougham's purchases through the other respondents and the specific price at which each sale and purchase was made.

	Record Reference
Respondent Dailey:	
General admission as to about 110 vehicles	R. 133–138.
Exhibits 8–75, corresponding to the 68 specific transactions alleged in Count I of the Second Amended Complaint (R. 58–61).	R. 147–166.
Respondent Schwartze:	
Exhibits 76–93, corresponding to the 29 specific transactions alleged in Count II of the Second Amended Complaint (R. 64–65).	R. 206–207, 248.
Respondent McFarland:	
General admission as to about 25 vehicles	R. 222–226.
Exhibits 97–150, corresponding to the 52 specific transactions alleged in Count III of the Second Amended Complaint (R. 68–71).	R. 226–233, 272–282.

veteran's priority certificate used for the acquisition of the surplus property (R. 445–446). Accordingly, the Government's recovery was limited to $8,000 (R. 119–120). The Government appealed on the ground that it was entitled to a damage award in the amount of $159,025.32, as computed under Section 26(b)(2) of the Act.[4]

The court of appeals rejected the district court's ruling that the Government was bound by its first complaint under the doctrine of election of remedies. It stated that, at the end of the trial, the Government was entitled to that amount of damages which the

[3] Since the district court's rulings limited the United States to recovery under Section 26(b)(1) (R. 116–117), and since no actual damages were proved, the amount of recovery depended upon the number of $2,000 forfeitures applicable to the facts in the case. Of four possible alternative bases for imposing forfeitures under Section 26(b)(1), the district court selected the one least favorable to the Government. The possible alternatives for imposing forfeitures, and the respective total liability computed thereon, are described by the following schedule:

	Dailey	Schwartze	McFarland	Totals	Liability computed at $2000
Separate items of property purchased	68	29	52	149	$298,000
Separate purchases	14	10	12	36	72,000
Separate days on which one or more sales took place	7	7	9	23	46,000
Certificates used in making purchases	1	1	2	4	8,000

This information is computed from data found in the Second Amended Complaint (R. 55–73).

[4] The respondents also appealed contending that the evidence was insufficient to support the finding of fraud and that the Government's action was barred by limitations. The court of appeals rejected both arguments. 270 F. 2d at 292–293.

court found was established by the evidence, in one of the three forms provided by the statute. Although the issue of who should select the remedy was neither briefed nor argued in the district court or the court of appeals, the latter court *sua sponte* raised the question in its opinion and decided that (270 F. 2d at 293):

> * * * the trial court had the power to give that form of relief to which he believed the government was entitled. He found the government had proved no actual damages. Therefore, he applied the simple monetary award for each of the proven acts of presentation of a priority certificate.

The court of appeals stated that the formula found in Section 26(b)(2) of "twice the consideration agreed to be paid," was "* * * much more apposite to a contract where the property has not passed but a consideration has been agreed upon." 270 F. 2d at 293. The court therefore held that it could not say on the record before it that the trial court had reached an erroneous conclusion as to the damage awards, and affirmed the district court judgment.

A petition for rehearing, challenging the court of appeals' holding that the Government lacked the power to select the remedy it deemed appropriate, was timely filed but was denied (R. 459).

SUMMARY OF ARGUMENT

I

Section 26(b) of the Surplus Property Act of 1944 contains three alternative remedies and specifically

provides that the choice of the appropriate statutory remedy in a particular case is to be made by the United States, and not by the district court. In terms, it states that each of the latter two remedies is to be available "if the *United States* shall so elect" (emphasis added). The legislative history of the Act expressly confirms that this reading of the language is correct. No litigant has ever before challenged this interpretation, and the courts have likewise always regarded the Act as granting the power of selection of remedy to the United States as plaintiff. The contrary view of the court below in this case, *sua sponte* and alone, stands against the specific statutory language, legislative history, and universally accepted interpretation since the passage of the Act.

The express language of the Act giving the United States the choice of remedy is fully consistent with the policy of the Act. Frauds perpetrated in obtaining surplus property cause serious damage to the objectives which the Act was designed to protect: the property interests of the Government and its interest in aiding bona fide veterans returning to civilian life. Since the damage to the Government's interests by frauds such as that involved here cannot be computed with mathematical certainty, Congress provided for alternative remedies in the form of liquidated damages to provide a measure of recovery. It was consistent with these aims for Congress to provide—as it specifically did—for the election among the several remedies to be in hands of the Government. The Government, in view of its familiarity with the ad-

ministration of the Act and the handling of Government property, is in the best position to select the specific remedy needed in a particular situation to protect the objectives of the Act and to make itself whole.

II

Respondents suggest that this case has been mooted by the Government's acceptance of promissory notes in payment of the $8,000 district court judgment which has become final and conclusive against them. But this Court has held that a petitioner is not precluded from seeking reversal of a judgment merely because he accepts payment of that part of the judgment to which he would in any event be entitled. *Embry* v. *Palmer*, 107 U.S. 3; *Erwin* v. *Lowry*, 7 How. 172. Therefore, the controversy as to whether the judgment in favor of the Government should be larger than $8,000 continues, and the case is not moot.

ARGUMENT

I

THE SURPLUS PROPERTY ACT SPECIFICALLY GIVES THE UNITED STATES, AND NOT THE DISTRICT COURT, THE OPTION OF SELECTING AMONG THE STATUTE'S ALTERNATIVE MEASURES OF DAMAGES

Section 26(b) of the Surplus Property Act, *supra*, pp. 2–3,[5] provides three remedies for the Govern-

[5] The Act, having been repealed and substantially reenacted as the Federal Property and Administrative Services Act of 1949, now constitutes permanent legislation and is the statutory framework for the sale of vast quantities of Government surplus property. The Department of Defense disposed of

ment against persons obtaining surplus property under the Act by means of fraud: first, $2,000 for each fraudulent act plus double any damage to the United States; second, twice the sum agreed to be paid to the United States for the property; and third, restoration of the property to the United States and retention by the United States of any consideration paid for the property. The decision below, which takes away from the United States and gives to the trial court the option to select one of these three alternative remedies, is directly contrary to the explicit language of the Act, its legislative history, and its accepted interpretation for over fifteen years.

The language of Section 26(b) is conclusive. It provides three "alternative remedies" which are *"in pari materia"* (*United States* v. *Doman,* 255 F. 2d 865, 869 (C.A. 3), affirmed *sub nom. Koller* v. *United States,* 359 U.S. 309), and each of which is "of the same nature and designed to serve the same purpose." *Rex Trailer Co.* v. *United States,* 350 U.S. 148, 151–

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property which had become excess to its needs worth approximately 6 billion dollars (acquisition cost) in 1958 and 8 billion dollars in 1959. It is estimated that such property worth 10 billion dollars will be disposed of during 1960. About 60% of this value is represented by surplus demilitarized equipment sold as scrap and salvage. An additional one-third of it is sold as usable property. See Hearings, Department of Defense Appropriations for 1960, Subcommittee of the Senate Committee on Appropriations, on H.R. 7454, 86th Cong., 1st Sess., p. 925. Accordingly, approximately nine-tenths of the total annual disposition of surplus military property is sold to the public and is subject (along with other Government surplus property disposed of by other agencies) to the Federal Property and Administrative Services Act of 1949, as amended.

152. In terms, it provides that the choice of the appropriate statutory remedy is to be made by the United States and not the trial court. The statute states the first remedy; then it sets forth, alternatively, the second remedy "if the *United States* shall so elect"; and last it gives, alternatively, the third remedy, again "if the *United States* shall so elect" (emphasis added). That the statute means just what it says in conferring the right to elect on the United States, not on the courts, is further confirmed by the Senate Report on the bill which became the Surplus Property Act of 1944. The Report unequivocally states that "The United States is given the option of electing among three different measures of damages * * *." S. Rep. 1057, 78th Cong., 2d Sess., p. 14. It would have been difficult for a committee of Congress to have expressed itself more clearly with respect to this question.

In light of this language and legislative history, it is not surprising that, during the fifteen years of administration of these provisions of the Act, no litigant has ever before challenged the right of the United States as plaintiff to select among the statute's three alternative remedies. For the same reason all courts—with the sole exception of the court of appeals in the present case—have consistently considered that the United States as plaintiff, and not the court, is to make the election.[6] The statute's unmistakable lan-

[6] For example, in *Lex Trailer Co.* v. *United States*, 350 U.S. 148, 150, this Court said that "The United States limited itself to the recovery * * *"; and in *United States* v. *Doman*, 255 F. 2d 865, 869 (C.A. 3), affirmed *sub nom. Koller* v. *United States*,

guage "* * * if the United States shall so elect * * *," excludes any other result.

The express language of Section 26(b) giving the United States the choice of remedy is fully consistent with the policy of the Act. In order to help veterans of World War II to readjust to civilian life, the Government was willing to sell property to them on more favorable terms than would obtain in the open market. But the Government was *not* willing to sell such property to those who did not fit the scheme of priority established by Congress and the Administrator.[7] Even if the Government had been so willing,

359 U.S. 309, the court stated that "* * * the United States was to have the option of selecting as its remedy any one of the three different measures of damages * * *." On this phase of the case, it must be noted too that, in its essentials, the decision below is in conflict with the principle underlying the recent decision in *Bernstein* v. *United States*, 256 F. 2d 697 (C.A. 10). In *Bernstein*, the district court, on the basis of application of the doctrine of election of remedies, had held the Government to recovery under Section 26(b)(2) as requested in its initial complaint. Its rationale was that the Government's subsequent demand alternatively for a different remedy was unfair to the defendants who might have conducted their subsequent business of selling about 30% of the surplus property they had bought in light of the Government's earlier demand under Section 26(b)(2). The Court of Appeals for the Tenth Circuit reversed, rejecting the election of remedies doctrine, and remanded the case with a direction to grant the remedy which the Government had finally demanded. Thus, the *Bernstein* case stands for the proposition that the Government's final choice of a remedy must be respected. In the instant case, however, the court below held that the Government's choice was not controlling.

[7] S. Rep. 1142, 79th Cong., 2d Sess., p. 3, reflects the high position of veterans in the priority scheme. First, selected surplus property—including some of the property involved

there is no indication that it would have been willing to sell the property generally at the same price and under the same conditions as it sold to veterans. Thus, respondents' fraud not only induced the Government to sell property to a person with whom it had no intention of dealing, but also to sell the property at low prices to a person not entitled to priority. Plainly, this caused damage to the Government and its interests, and hindered the fulfillment of the high aims Congress set for the Surplus Property Act. Moreover, fraudulent purchases necessarily reduce the amount of surplus property available for other disposition. Therefore, it is possible that Government agencies which are entitled to the next priority may be compelled to purchase such property elsewhere at higher prices. While Congress was agreeable to that result to the extent that veterans were the priority purchasers, it intended that Government agencies have the next priority after veterans.[8] In sum, it is as true here, as it was in *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 153, that the fraudulent sales to respondents "* * * precluded bona fide sales to veterans, decreased the number of

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here—is set aside for exclusive disposal to veterans. The list of priorities for property not so set aside is as follows:

1. Federal Government.
2. Veterans generally.
3. Small business.
4. States and their political subdivisions and instrumentalities.

[8] This is true only as to the property involved here which was set aside for veterans. As to the other property, federal agencies had first priority before veterans. See *supra*, note 7.

motor vehicles available to Government agencies, and tended to promote undesirable speculation."

These elements of damage to the various interests of the United States, as described in the objectives of the Act,[9] cannot be computed with mathematical precision. Congress was fully aware of this and therefore in Section 26(b) of the Act attempted to avoid this difficulty as far as possible. This was done by providing for alternative remedies in the form of liquidated damages, the last two being expressly so described in the Act. See Section 26(b)(2), (3), *supra*, p. 3; *Rex Trailer Co.* v. *United States*, *supra*, 350 U.S. at 151. As this Court said in *Rex Trailer*, *supra*, at 153–154, "The damages resulting from [the] injury may be difficult or impossible to ascertain, but it is the function of liquidated damages to provide a measure of recovery in such circumstances * * *." It was consistent with these aims of Section 26(b) for Congress to provide—as it specifically did—for the election among the several remedies to be in the hands of the Government. Certainly, the Government is in the best position, in view of its familiarity with the administration of the Act and the handling of Government property, to select the specific remedy needed in a particular situation to protect the objectives of the Act and to make itself whole.

The court of appeals, however, stated (R. 457) that the Section 26(b)(1) remedy selected by the district court is more appropriate than the Section

[9] The objectives are fully spelled out in Section 2 of the Surplus Property Act of 1944, 58 Stat. 766, 50 U.S.C. App. (1946 ed.) 1611.

26(b)(2) remedy selected by the Government when applied to the facts involved here. All of the elements of the fraud, the consideration agreed upon for the property, the agreement to pay, and the payment, were proved at the trial by the Government (see the Statement, *supra*, p. 6; R. 173–174, 237, 241, 244–253). The court of appeals' reasoning as to the inapplicability of Section 26(b)(2) to these facts is that its remedy "seems much more apposite to a contract where the property has not passed but a consideration has been agreed upon" (R. 457). But this limitation cannot possibly be squared with the language of the Act. There is no real doubt that the Section 26(b)(2) remedy of twice the agreed consideration plainly applies to fully executed transactions. *Solomon* v. *United States*, 276 F. 2d 669 (C.A. 6), pending on petition for certiorari, No. 133, this Term; *United States* v. *Bernstein*, 149 F. Supp. 568 (D. Colo.), reversed on other grounds, 256 F. 2d 697 (C.A. 10).[10]

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[10] Respondents have argued that the Section 26(b)(2) remedy is inapplicable as a matter of law, because it cannot apply to executed transactions. They do not, and cannot, assert that the remedy is unreasonable because the amount involved exceeds any potential damage to the Government's interest. It would clearly have been appropriate for the district court to assess forfeitures on the number of separate purchases made by respondents, or on the number of items of property purchased by them. See *United States* v. *Rubin*, 243 F. 2d 900 (C.A. 7); *Daniel* v. *United States*, 234 F. 2d 102 (C.A. 5). This would have established a forfeiture range between $72,000 and $298,000 (see *supra*, p. 7, note 3). A recovery of $159,025.32 under Section 26(b)(2), which represents twice the consideration sought by the Government, is within this range. The unusually low recovery of $8,000 awarded by the district court would permit these respondents to spread the burden

The court below aslo suggested (R. 457) that recovery under Section 26(b)(1) is more appropriate than recovery under Section 26(b)(2) because of the fact that the Government proved no actual damages. Since there is no requirement for such proof under Section 26(b)(2), the availability of proof of actual damages is completely irrelevant to imposition of that remedy. Thus, there is no supporting statutory language or legislative history for any of the suggestions advanced by the court below in order to justify its rejection of the Section 26(b)(2) remedy.

II

THIS CASE HAS NOT BEEN MOOTED BY THE ACCEPTANCE BY THE UNITED STATES OF PROMISSORY NOTES IN PAYMENT OF THE LESSER AMOUNT AWARDED BY THE DISTRICT COURT

The Government's position in the court below and here is that the district court erred in awarding it only $8,000 under Section 26(b)(1) and that it was entitled to a damage award of $159,025.32 under Section 26(b)(2). Respondents now suggest that this case is moot because the Government has accepted promissory notes in payment of the $8,000 concededly due, and that the United States "should be estopped from further pressing its demands in this proceeding." Respondents' Reply to Petition for a Writ of Certiorari, pp. 11–13.

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of their fraud "progressively thinner over projects each of which individually increased their profit," a result which, as this Court stated, Congress did not intend under the False Claims Act's provision which is similar to that found in Section 26(b)(1) of the Surplus Property Act. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 552.

The $8,000 judgment, while affirmed on appeal and challenged here by the United States on the ground that it is inadequate, was not challenged in this Court by respondents. Thus, as to them, it is binding and there can be no question that the Government could have sought execution on the $8,000 judgment had respondents not arranged to pay it or filed a supersedeas bond. Moreover, the acceptance of the promissory notes by the Government enabled respondents to obtain a release of the judgment liens against them with respect to the $8,000 judgment.

In these circumstances, respondents' contention of mootness is frivolous. The rule has been long established that a plaintiff who seeks a money judgment but obtains only a smaller judgment than that sought is not precluded from appealing merely because he has accepted payment of the smaller judgment. In *Embry* v. *Palmer*, 107 U.S. 3, 8, this Court completely rejected the contention that a plaintiff in error is estopped from prosecuting his appeal because he has accepted payment of a smaller amount:

> * * * The amount awarded, paid, and accepted constitutes no part of what is in controversy. Its acceptance by the plaintiff in error cannot be construed into an admission that the decree he seeks to reverse is not erroneous; nor does it take from the defendants in error anything, on the reversal of the decree, to which they would otherwise be entitled; for they cannot deny that this sum, at least, is due and payable from them to him. * * *

Again in *Erwin* v. *Lowry*, 7 How. 172, 184, the Court declared that "in no instance within our knowledge

has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights." Accord: *United States* v. *Dashiel*, 3 Wall. 688, 701–702; *Luther* v. *United States*, 225 F. 2d 495 (C.A. 10); *Automobile Ins. Co.* v. *Barnes-Manley*, 168 F. 2d 381, 386 (C.A. 10); see also *Reynes* v. *Dumont*, 130 U.S. 354, 394; *Worthington* v. *Beeman*, 91 Fed. 232, 234 (C.A. 7); *Snow* v. *Hazlewood*, 179 Fed. 182, 184 (C.A. 5); *Carson Lumber Co.* v. *Saint Louis & San Francisco Railroad Co.*, 209 Fed. 191, 193–194 (C.A. 8); *Peck* v. *Richter*, 217 Fed. 880, 881 (C.A. 8); *Walters* v. *Fulton*, 14 F. 2d 107 (C.A. 9); *Armstrong* v. *Lone Star Refining Co.*, 20 F. 2d 625, 626 (C.A. 8); *Mudd* v. *Perry*, 25 F. 2d 85, 86 (C.A. 8); *Fifth Avenue Bank of New York* v. *Hammond Realty Co.*, 130 F. 2d 993, 994 (C.A. 7), certiorari denied *sub nom.* *McHie* v. *Fifth Avenue Bank, Executor*, 318 U.S. 765. As the acceptance of the $8,000 by the United States does not prevent the United States from continuing to claim that the judgment below is erroneous and that $151,025.32 is still owing ($159,025.32 less $8,000), the case obviously still presents a real controversy and is not moot.

Since the United States is entitled to $8,000 in any event, and the only question left in the case is whether the judgment to which it is entitled should be even larger, there can be no possible prejudice to respondents resulting from their having paid the smaller

amount they concededly owe the United States. *Lanier* v. *Nash*, 122 U.S. 637. If the United States should not prevail in this court, respondents have paid only what they owed. If this Court reverses the decision of the court of appeals so that the United States obtains judgment for a larger amount, the amount already paid by respondents will be applicable as a credit toward payment of the larger judgment. *Erwin* v. *Lowry*, *supra*, 7 How. at 184.

CONCLUSION

For the foregoing reasons, we submit that the decision of the court below should be reversed and remanded with instructions to the district court to enter judgment for the United States in the amount of $159,025.32 with interest and costs.

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AUGUST 1960.